

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ROSY GIRON DE REYES,	:	
	:	
et al.,	:	
	:	
Plaintiffs,	:	Civil Action
	:	No. 1:16-cv-00563-LO-TCB
v.	:	
	:	
WAPLES MOBILE HOME PARK,	:	October 19, 2021
LIMITED,	:	10:00 a.m.
	:	
et al.,	:	
	:	
Defendants.	:	
	:	
.....	:	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE

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1 MORNING SESSION, OCTOBER 19, 2021

2 (10:01 a.m.)

3 THE COURTROOM CLERK: The Court calls *Rosy Giron de Reyes,*
4 *et al. versus Waples Mobile Home Park, Limited Partnership, et*
5 *al.,* Case No. 1:16-cv-563.

6 May I have appearances, please, first for the plaintiff?

7 MR. WARNER: Clay Warner, Your Honor, for plaintiff.

8 THE COURT: All right. Good morning. And if you're more
9 comfortable taking your masks off, I understand everyone is
10 vaccinated, as are all of my colleagues here in the well of the
11 court. Whatever you're comfortable with.

12 MR. DINGMAN: Thank you, sir.

13 Good morning, Your Honor. Michael Dingman and Grayson
14 Hanes for the defendant.

15 THE COURT: All right. Good morning to you both.

16 All right. Thank you for coming back. After we sent out
17 the request for further briefing, I found that the parties were
18 still in certainly disagreement about where the facts of the case
19 were, and where the Fourth Circuit was on the decisions, and --
20 and what Judge Ellis had done, and I wanted to come back and see
21 if I could continue our dialogue.

22 As you're both aware, there's a -- not a lot of case law
23 on disparate impact cases, and, of course, we have the Supreme
24 Court case which guides us, and there's -- we also have the other
25 regulations and -- what I have divined from the Fourth Circuit

1 opinion is that they looked as they should have, as -- at the
2 disparate impact decision under the 12(b)(6) standard.

3 They clearly talked about the statistical analysis that
4 had been done and identified in the complaint. They went on in
5 the decision to state that they had also looked at the additional
6 information that plaintiffs had brought to bear on that
7 statistical information then as to whether it demonstrated the
8 evidence under Prong 1, and we're impressed with it. But they
9 didn't make a finding, that, as a matter of law, the plaintiffs
10 have met Prong 1, and they clearly found that that was a matter
11 that the Court would have to decide and -- when the case came
12 back down before it.

13 And they also didn't decide Prongs 2 or 3. There was
14 briefing on it, I understand that, but, you know, they clearly
15 said, you know, looking at page 30, because the District Court
16 concluded that plaintiffs failed to make a prima facie case of
17 the FHA violation under the disparate impact theory at the motion
18 to dismiss stage, it never considered the second step.
19 Similarly, the District Court never considered the third and
20 final step.

21 In such circumstances, it's prudent for this Court to
22 remand to the District Court for consideration of these issues in
23 the first instance. So then it comes back, and Judge Ellis, in a
24 fairly short opinion, denies summary judgment on the disparate
25 impact and identifies what he thinks generally to be issues that

1 are intertwined with material facts of issue in dispute and sets
2 it for a final pretrial conference.

3 We looked a little more closely at Prong Number 2 and
4 especially whether there was intent -- well, when we looked at
5 whether, in fact, there was a policy, and also whether that
6 policy was enforced, and, third, what the intent of the policy
7 itself was, because -- and this may be a matter which the jury
8 has to determine, but there was clear evidence that at certain
9 times, plaintiffs didn't intend to evict any of the tenants;
10 instead were using this as a means to get added monthly rents,
11 and so I don't know how that factors into our case, but I'm
12 interested in hearing from you-all on that.

13 And then there's a great disagreement as to whether
14 knowledge of the anti-harboring statute is necessary under Step
15 2. And, in particular, plaintiff focuses in on how the issue of
16 how can you show a business necessity under Prong 2 if somebody
17 does not know about the anti-harboring statute and is not putting
18 forth the restriction, requirements of identification in defense
19 of it.

20 And certainly, also, the parties looked at the
21 CFR 100-500, which focuses that after the pleading stage, the
22 defendant may establish that plaintiff has failed to meet a
23 burden -- its burden of proof to establish a discriminatory
24 effects claim by demonstrating any of the following: The policy
25 or practice is intended to predict an occurrence of an outcome;

1 the prediction represents a valid interest, et cetera, and then
2 goes on to say "the defendant's policy or practice is reasonably
3 necessary to comply with the third-party requirements, such as a
4 federal, state or local law." So I would like the parties to
5 address that.

6 And then finally whether -- once more, whether there's
7 really any real issue of fact as to Prong 3, if we get to
8 Prong 3.

9 So who wants to go first? I guess it's Waples.

10 Do you want to go first?

11 MR. DINGMAN: Yes, sir. Good morning again, Your Honor.
12 So let me just walk through the questions that -- that I wrote
13 down that the Court has, and obviously, if I miss anything,
14 please let me know.

15 THE COURT: Sure.

16 MR. DINGMAN: On the first issue of this -- this added
17 monthly rent and what went on back in 2016, there was no
18 additional rent that was collected. The plaintiffs were never
19 evicted from the park. There were letters that were sent, and
20 that's what the Court, I believe, has seen that did suggest that
21 an additional rent would be required, but that was never enforced
22 or collected, and the parties effectively agreed to allow the
23 plaintiffs to leave the park voluntarily.

24 As we pointed out in our brief in response to the Court's
25 questions, there was a TRO filed. That was all resolved because

1 there was an agreement not to evict and to allow these folks to
2 leave. Many of them waited until the end of the school year and
3 then left. So there was no additional monthly rent that was
4 collected. There was no eviction of these plaintiffs. I think
5 there's no dispute about that.

6 With respect to whether motive is a consideration at Step
7 2, we would suggest, Your Honor, that the answer is clearly no.
8 And that is based upon not just the Supreme Court's decision in
9 *Inclusive Communities* which controls this case, but the cases
10 that the Supreme Court in *Inclusive Communities* cited with
11 respect to what is the analysis for a disparate impact claim
12 under the Fair Housing Act. And the Court itself in its initial
13 order asking for the additional briefing plugged in *Inclusive*
14 *Communities* in the *Griggs* case, for example, both of which
15 clearly state that motivation is not a consideration.

16 The *Griggs* case, for example, cited by the *Inclusive*
17 *Communities* court -- I just want to be sure to get the quote
18 correct. The Court cited *Griggs*, and then it cited a more recent
19 case, *Smith v. City of Jackson*, and it says as follows: "As the
20 Court observed" -- referring to the Fair Housing Title VII
21 claim -- "these provisions focus on the effects of the action on
22 the employee rather than the motivation for the action of the
23 employer."

24 And this was a review, obviously, of an employment
25 discrimination disparate impact claim. We cited to the Court

1 these same cases and some additional cases. In their response,
2 the plaintiffs did not address the Supreme Court's decisions at
3 all. They make no effort to refute the holdings in those cases
4 that, with respect to disparate impact, it's the effect, not the
5 motivation. That's what distinguishes disparate impact from
6 disparate treatment. That is clear under Supreme Court
7 precedent. Instead of addressing the Supreme Court cases, the
8 plaintiffs point the Court to a 2011 Third Circuit case, the
9 *Mount Holly* case, obviously decided before *Inclusive Communities*,
10 not binding on this Court, and, of course, subject to Supreme
11 Court precedent.

12 That case did not hold that at Step 2 motive is a required
13 issue to be considered by the Court in determining whether the
14 policy satisfies a valid interest. In fact, it never got to the
15 Step 2 analysis.

16 And one would assume that the Third Circuit would not make
17 a decision that conflicts with binding Supreme Court precedent
18 that was in place in 2011 and was reinforced in *Inclusive*
19 *Communities*. The plaintiffs have not pointed this Court to one
20 case where a court has held the policy serves a valid interest,
21 but because the defendant cannot demonstrate that that interest
22 was in mind when the policy was enacted, it's now an invalid
23 interest, and the policy has to be struck down.

24 That is completely contrary to what the Supreme Court held
25 in *Inclusive Communities*, and it makes absolutely no sense.

1 That's why there's no case law in support of that position. And
2 just to play that through, Your Honor, and you mentioned in your
3 opening remarks a reference in the CFR to reasonably necessary to
4 comply with the law.

5 Under the plaintiff's theory, the Court could find that
6 there is a policy that is necessary to comply with the law and
7 therefore satisfies valid interests. But the plaintiffs would
8 say, Wait a minute, nobody thought about that on the defendant's
9 side when the policy was enacted. So now the Court has to strike
10 down this valid policy and put the defendants in a position of
11 conflicting and not complying with federal or state law.

12 That is the essence of their argument, that -- the
13 defendants can demonstrate that the policies serve a valid
14 interest, but if it cannot demonstrate that that was in their
15 mind when the policy was enacted -- or now they've sort of
16 shifted their theory to when it was enforced -- then the Court
17 must find a violation of the Fair Housing Act and must strike
18 down this policy putting the defendants in conflict with law.
19 That is completely contrary to *Inclusive Communities*.

20 THE COURT: Well, the intent of the law is to prevent
21 discrimination in housing, and, of course, the FHA is included
22 in -- under the statute, so the broader premise is, we're going
23 to prevent discrimination in housing. Disparate impact is
24 certainly a valid inquiry, legal inquiry, so you look at it from
25 an umbrella point of view.

1 If the defendants, Waples, didn't know about the
2 anti-harboring statute, then they certainly were not trying to
3 prevent discrimination, and in fact their policy is
4 discriminatory, so we're not going to look at whether they
5 actually have a valid interest because they didn't know about it.
6 I guess that's the argument.

7 Is that how you see it?

8 MR. DINGMAN: Well, I -- I think the argument is, as I
9 understand it, is the plaintiffs want the Court to question
10 whether it's a valid interest because the defendants did not
11 consider it, which, of course, factually we disagree with, but
12 assuming that for the moment that the defendants did not think
13 about at the time that the policy was enacted, and our view of
14 that, Your Honor, is there's nothing in *Inclusive Communities*
15 that suggest that motivation is a consideration in determining
16 whether the policy satisfies a valid interest.

17 If the Supreme Court intended that to be one of the
18 requirements, it would have expressly said so, and that is not a
19 requirement in any other disparate impact case decided by the
20 Supreme Court. So the Supreme Court, in looking at disparate
21 impact cases, has never held nor does the statute require, that
22 the valid interest must have been considered when the policy was
23 enacted. The question that *Inclusive Communities* put forth at
24 Step 2 is whether a valid interest is served by the policy. Hard
25 stop. That's the inquiry.

1 The Supreme Court didn't say "and the valid interest was
2 considered by the defendant." If that's what the Court intended,
3 that's a very important additional requirement and a requirement,
4 I would suggest to the Court, that would require just about every
5 disparate impact case under the Fair Housing Act to proceed to
6 trial because there would be a state of mind inquiry which could
7 never be resolved or rarely resolved by a court short of a trial.

8 And one of the things that the Supreme Court emphasized in
9 *Inclusive Communities* was a swift resolution of these types of
10 claims. So it's contrary to that concept and contrary to the
11 language of *Inclusive Communities* for the plaintiffs to suggest
12 that there is an additional requirement to satisfy Step 2, that
13 demonstrating a valid interest is not enough, and that is their
14 argument.

15 And that leads to another conflict with *Inclusive*
16 *Communities*. *Inclusive Communities* clearly stated that there's
17 no violation of the Fair Housing Act if the policy is necessary
18 to comply with federal law. The CFR says the same thing. The
19 suggestion of the plaintiffs is, even if the Court were to find
20 that there is significant risk, and we think it's uncontroverted
21 that there is, a prosecution under IRCA, the Court can still
22 strike down the policy, or if another case came before this Court
23 and the Court held that this policy is necessary to comply with
24 federal or state law, the Court could strike that policy down and
25 put the defendant in conflict with law. That's exactly the

1 opposite of the holding in *Inclusive Communities*. That's the
2 double bind of liability that the *Inclusive Communities* court
3 said, "We're not going to place defendants in that."

4 So motivation, intent, what the parties -- what the
5 defendants thought at the time the policy was enacted or enforced
6 has nothing to do with the Step 2 inquiry described by *Inclusive*
7 *Communities*. It's a very straightforward inquiry. Does the
8 policy satisfy a valid interest? That's it. The attempt to
9 layer on additional requirements is contrary to *Inclusive*
10 *Communities* and it finds no support in any other case.

11 There's no case that the plaintiffs have pointed to where
12 a court has held, yes, the policy serves a valid interest, but
13 because the defendants didn't think about the interest, I'm
14 striking down the policy and I'm finding a violation of the Fair
15 Housing Act. There is no case in any context dealing with
16 disparate impact that comes to that conclusion. There's a
17 reason. Because disparate impact, as the Supreme Court has held
18 many times, is not concerned with the motivation of the policy;
19 it's concerned with the effect of the policy. Therefore,
20 motivation or whether the parties, the defendants in this
21 instance, considered this particular issue is not relevant to the
22 Step 2 inquiry at all.

23 With respect to Step 3, Your Honor, there has been no
24 alternative policy proposed by the plaintiffs to satisfy the
25 issue that drives the policy or at least a Step 2 review of

1 potential criminal prosecution under IRCA and in light of the
2 *Aguilar* case. That is because that case held that if there is
3 sufficient knowledge that you may be renting to someone who is
4 not in the United States legally and you take no action, then you
5 can be prosecuted under that statute. That's what happened to
6 Ms. Aguilar.

7 So it was two steps. Is there enough for you to know?
8 And if you get to that point, then you have to do something about
9 it. The Court found that she had enough knowledge, reckless
10 knowledge, and then she did nothing to determine whether, in
11 fact, her tenants were in the United States legally, and she was
12 convicted.

13 In this case, Your Honor, the predicate of the complaint,
14 the plaintiffs' very allegations are that in this particular area
15 of Fairfax County, there's a high concentration of Latinos, and
16 therefore a high concentration of illegal immigrants in the
17 United States in that area, in that park.

18 That's the basis for their claim. And it's uncontroverted
19 that the female plaintiffs, in fact, are not in the United States
20 legally. So there is no alternative policy other than one that
21 requires some proof of legal residency. Otherwise, if you rise
22 to the level of knowledge, and we suggest that there's no doubt
23 that that knowledge exists here, that's, again, the
24 plaintiffs' -- their disparate impact theory rests on that
25 concept.

1 We now have actual knowledge that the female plaintiffs
2 were not in the United States legally. How can the defendants
3 then say we are not going to take any steps to verify whether
4 applicants or residents at our park are in the United States
5 legally? That's what Ms. Aguilar failed to do, and she was
6 convicted of a crime.

7 So when we get to Step 3, the plaintiffs have not
8 proffered any policy that would address that issue because there
9 is none.

10 THE COURT: What about the ITINs? Is there some plausible
11 argument that that would give Waples cover from criminal
12 prosecution?

13 MR. DINGMAN: No. And the reason is, Your Honor, the
14 ITINs, and this is very clear from the IRS, are not proof of
15 legal residency. They are issued primarily for tax collection
16 purposes. Then, in fact, the IRS has made it clear that ITINs
17 are not proof of legal residency in the United States. All
18 that's required is that you send in an application with some
19 document.

20 And as an example in this case, one of the female
21 plaintiffs entered the United States using somebody else's
22 passport. She could have taken that passport, filled out the
23 ITIN application, sent it in, and she would have been issued an
24 ITIN number in the name of somebody else. So the ITINs are not
25 proof of legal residency in the United States, and so they are

1 not an alternative policy. And again, that's well known.

2 So, if you look at the defendants in this context, what do
3 you know, what did you attempt to do, a prosecutor or U.S.
4 attorney could say, Well, it's evident that ITINs are not proof
5 of legal residency. It's just a number issued by the IRS.

6 So the ITINs are not a solution to that issue either. In
7 fact, Your Honor, I would submit that if all an applicant can
8 provide is an ITIN, that demonstrates a lack of legal residency
9 in the United States, because if they had a document that's
10 established that legal residency, they would provide it. They
11 would not say, "Hey, let me give you my ITIN number," because the
12 ITIN number is really there to collect taxes from people who are
13 not legally in the United States.

14 So not only is the ITIN not a solution, in our view, it
15 heightens the possibility of a prosecution because you would know
16 as a landlord this is not proof, and if this is all that the
17 applicant can provide, it's pretty strong evidence that they have
18 no ability to demonstrate legal residency in the United States.

19 And so in their response to the Court's question on Step
20 3, the plaintiffs didn't even offer a policy. They made an
21 argument that, well, all the prior arguments that we've made
22 demonstrate that there's a violation of the Fair Housing Act, and
23 then they argue that because, allegedly, for some period of time
24 the plaintiffs were allowed to stay in the park, that there was
25 some acquiescence. That's not a policy. At best, that's an

1 argument that goes back to Step 2. So the plaintiffs themselves
2 have not offered any alternative policy at Step 3 to address the
3 issue of how do you avoid potential prosecution under IRCA based
4 on the Aguilar decision?

5 The only way is to do what the plaintiffs have done
6 here -- I'm sorry, the defendants, which is provide proof of
7 legal residency. That way they can -- the defendants can say we
8 attempted to make sure that we determined as best we could
9 whether our tenants are here illegally or not.

10 THE COURT: Thank you, Mr. Dingman.

11 MR. DINGMAN: Thank you.

12 MR. WARNER: Good morning. I'm going to try my best to
13 answer your questions and respond to Mr. Dingman.

14 I think, from the outset, it has become apparent that with
15 respect to factual matters, there's more disputes than either of
16 us can enumerate over the next period, and I'm going to start
17 with the first point about eviction.

18 We strongly contest any implication that the plaintiffs
19 left voluntarily. They were about to be evicted, and they were
20 forced out of the park. There's -- to say there's no dispute
21 that they weren't evicted is a little bit of a play, because what
22 I think is implied is that they left voluntarily, when I think
23 the only truth to that statement is that no one went through the
24 formal eviction proceedings in court to have them thrown on the
25 street.

1 THE COURT: Clearly, the word was out that they were going
2 to be -- there was written documentation demonstrating an
3 intent --

4 MR. WARNER: Correct. Thank you.

5 THE COURT: -- to end their lease.

6 MR. WARNER: Let me next address the question of motive at
7 Step 2. But let me start with a backdrop. I want to go back to
8 the interrogatory answers that the defendants gave us in 2016
9 when we asked: What were the reasons for your policy? This is
10 after the plaintiffs left the park involuntarily, after the
11 lawsuit was filed, into discovery, after actually Judge Ellis had
12 issued his decision on their motion to dismiss.

13 So we were already in discovery, the plaintiff's --
14 defendant's response was: "The reasons for creating the policy
15 are to confirm the identity of the applicants and any adult
16 occupancy" -- "occupants to perform credit checks, minimize
17 identity fraud, and to eventually perform criminal background
18 checks, and minimize loss from eviction."

19 There's nothing there about IRCA or *Aguilar* or harboring,
20 and that wasn't an oversight. That was their position until --

21 THE COURT: Would you read that one more time, the answer?

22 MR. WARNER: Yeah. It's Docket 138, Exhibit 42 at Page 2,
23 "To confirm the identity of the applicants and any adult
24 occupants, to perform credit checks, minimize identity fraud, and
25 to eventually perform criminal background checks and minimize

1 loss from eviction."

2 Again, what we know from that is that our highly capable
3 colleagues here came up with this IRCA argument, harboring
4 argument well into the litigation. When it was applied to our
5 plaintiffs, Aguilar, IRCA were no part of the policy at all, no
6 part of the reason for it.

7 Now, regulations from HUD, which Your Honor has looked at,
8 we think it makes it very clear that this post-hoc creativity is
9 not to be countenance with respect to Step 2. You have to look
10 at the actual reason. HUD tells us the regulations have to be,
11 quote, "supported by evidence and may not be hypothetical or
12 speculative." That's in the reg itself.

13 In the federal Register notice, they go further and say,
14 "It's supposed to be genuine and not false, not fabricated or
15 pretextual." A post-hoc rationalization created by lawyers is
16 clearly fabricated. It's obviously pre-textual; it's obviously
17 hypothetical and false. It's not the reason the policy was
18 adopted, so it can't be a valid justification at Step 2.

19 I note also that -- and we said this in our papers -- the
20 Supreme Court quoted from the HUD regulations and set up the
21 system that they set up in *Inclusive Communities* to be parallel
22 with those HUD regulations.

23 Now, the responses from defendants are mostly beside the
24 point. They say that there's nothing in Step 2, in the statute
25 about Step 2. It says it has to be -- the defendants can't be

1 fabricated or pretextual. Of course, there's nothing in the
2 statute. There's nothing really nothing in the statute that
3 describes disparate impact either. We know that from *Inclusive*
4 *Communities*. It's a judicially-made system. The three-step
5 standard is created by courts; it's not in the statute.

6 And then we're also -- I also hear that *Inclusive*
7 *Communities* itself goes at great length to talk about the fact
8 that motivation is not part of the consideration. And that's
9 true, but that's at Step 1. At Step 1, disparate impact does not
10 look at motivation. It looks at effects, but it's Step 2 and
11 Step 3 which are relevant here. We know from the HUD regulations
12 that motivation is important.

13 Now, Mr. Digman mentioned the *Mount Holly* case out of the
14 Third Circuit dismissed it because it was prior to *Inclusive*
15 *Communities*. Literally, that's true, too, but the *Mount Holly*
16 case is completely consistent with *Inclusive Communities*. What
17 he didn't mention was a Ninth Circuit case, *Avenue 6E*. That
18 quotes the relevant portions of *Mount Holly* after *Inclusive*
19 *Communities*.

20 THE COURT: Well, I don't think *Mount Holly* is on point,
21 really. You're talking about the --

22 MR. WARNER: I'm sorry, Your Honor.

23 THE COURT: You're talking about the blight in the old
24 neighborhood. I don't think *Mount Holly* applies to our Step 2
25 case. I just don't think it's on all fours with our case. It

1 was, as, you know, talking about a blight in the neighborhood and
2 was there a legitimate interest in restoring those downtown
3 neighborhoods, and it really looked at the Step 3 in the burden
4 shifting, I think. So if you -- the Ninth Circuit case, I
5 haven't focused on it, if you believe that that somehow brings
6 *Mount Holly* into the discussion.

7 What's the Ninth Circuit case?

8 MR. WARNER: It's *Avenue 6E*, Your Honor.

9 THE COURT: Okay.

10 MR. WARNER: Let me respectfully disagree on the point
11 with respect to *Mount Holly*.

12 When it was looking at a legitimate interest, it was doing
13 that at the Step 2 and Step 3 process, and that's exactly what
14 we're talking about: Was there, in fact, a legitimate interest
15 in existence at the time the policy was enacted and implied?

16 I should move now to the discussion of IRCA and *Aguilar*
17 and whether or not that actually provides a defense at Step 2 or
18 Step 1 or Step 3. But before I do that, I sort of want to make
19 two points at the outset. One is that the defendant's briefing
20 with respect to Step 2 uses the term "valid interest," and I'm
21 sure, as the Court is aware, valid interest is the term used by
22 *Inclusive Communities*.

23 But in the sentence after "valid interest," the Supreme
24 Court defines that. It defines it as follows: "This step of
25 analysis is analogous to the business necessity standard under

1 Title VII." And later in the same paragraph, it defines it
2 further, quote, "If they can prove that a step is necessary to
3 achieve a valid interest."

4 Now, defendants tend to ignore the existence of those
5 modifiers under the words necessary and necessity, but they're
6 there, and it's important to keep them in mind.

7 THE COURT: Well, I mean, if you look at the business --
8 if you look at it as a business necessity, which I think is
9 appropriate, I think correct, avoiding criminal prosecution, is
10 that not a pretty obvious business necessity?

11 MR. WARNER: Well, let me put it the way the defendants
12 did, because actually this statement I agree with. If they could
13 show, quote, "they had no discretion to ignore the potential
14 criminal implication of renting to undocumented immigrants," then
15 yes. That's a business necessity.

16 But let me start by saying something about that, which is
17 we made a point in our briefing. That specific issue was
18 presented to the Fourth Circuit on appeal. They presented it in
19 the context of Step 1 because of an invitation to do so in
20 *Inclusive Communities*.

21 THE COURT: Right.

22 MR. WARNER: But the matter was not taken up, and, in
23 fact, it was effectively rejected implicitly by the Fourth
24 Circuit. And, as Judge Ellis went on at some length noting,
25 "this Court is bound by the implicit as well as explicit

1 rulings."

2 THE COURT: As I started my -- our morning discussion, I
3 don't think the Fourth Circuit precluded analysis under Step 2,
4 and I don't think that they looked carefully at anything other
5 than the fact that Judge Ellis had wrongly decided the disparate
6 treatment, and that he also had really not looked at disparate
7 impact under the 12(b)(6) standard, and -- and given plaintiff's,
8 the well-pleaded complaint analysis.

9 And so that kind of went out with both guns, and -- but,
10 as I read in their decision, they said we're going to allow the
11 Court to go back, as we should, and look at the allegations in
12 the complaint under the -- under 12(b)(6), and he has not decided
13 either Steps 2 or 3, and so let's -- we'll look at it again if we
14 need to.

15 So I don't think there was a preclusive finding. I know
16 that there was briefing on it and that the Court was invited to
17 do lots of different things, but I think what they did do was
18 limited to what they said in their decision.

19 MR. WARNER: I appreciate that. But just briefly, Your
20 Honor.

21 THE COURT: Yeah.

22 MR. WARNER: If that argument had any merit, the Fourth
23 Circuit would have had to have ruled for the defendants.

24 THE COURT: On a 12(b)(6) standard?

25 MR. WARNER: At Step 1.

1 THE COURT: Did they have enough information at Step 1?

2 MR. WARNER: At Step 1. The argument comes from a line in
3 *Inclusive Communities*. And the line is this: "If the
4 plaintiffs cannot show a causal connection between the
5 defendant's policy and a disparate impact; for instance, because
6 federal law substantially limits the defendant's discretion, that
7 should result in dismissal of this case." That's at page 543 of
8 the decision.

9 That was a Step 1 analysis. That's what the defendants
10 invited the Fourth Circuit to rule on. So if it were true that
11 the existence of IRCA substantially limits defendant's
12 discretion, they had to win at Step 1.

13 THE COURT: But the Fourth Circuit didn't look at that,
14 they looked at the causal connection under -- they were totally
15 focused on the statistical analysis in doing so and not any
16 underlying law, at least my reading of it.

17 MR. WARNER: Understood. I just wanted to make sure that
18 you were aware --

19 THE COURT: Okay.

20 MR. WARNER: -- of the way that worked.

21 Now, but looking specifically at the defendant's argument,
22 they argue that they had no discretion, that the law gave them no
23 discretion, and I'm quoting from page 7 of their brief there.

24 So, in other words, what they're saying is they have to
25 show, based on undisputed facts, that IRCA requires them to check

1 the immigration status of all adult residents, and they have not
2 made that showing, not even close.

3 We asked and they did not identify a single private lessor
4 who had that form of policy. And they've been completely unable
5 to explain a Virginia state law that specifically says that
6 lessors in an apartment context are allowed to accept ITINs, as
7 well as social security numbers, for lease underwriting.

8 Now, Mr. Dingman just said that the only reasons someone
9 would have an ITIN and not a social security number is if they're
10 not lawfully present in the United States, but Virginia law
11 expressly says that lessors can accept ITINs if a social security
12 number is not available.

13 The reason that they can't make those showings is they're
14 just badly misreading *Aguilar*. *Aguilar* does not hold that all
15 landlords have to check immigration status. The case involved
16 the owner of a flophouse who had been repeatedly confronted by
17 immigration authorities.

18 No court has held that renting an apartment -- that
19 someone renting an apartment or someone renting in this case a
20 mobile home lot must check immigration status under IRCA. In
21 fact, the three circuits have addressed that, Your Honor, and
22 ruled the opposite way.

23 THE COURT: Well, how about the fact that the immigration
24 service had been over to Waples and said -- and checked and told
25 them, "You need to make sure that your tenants are legally here"?

1 Isn't that -- aren't those allegations in this --

2 MR. WARNER: I'm not aware of those allegations. If they
3 are allegations, we dispute them.

4 THE COURT: Okay. All right. Maybe I made that up.
5 Maybe that was part of the back-and-forth back on this side.

6 MR. WARNER: This is an extraordinarily complicated case.

7 THE COURT: Yeah.

8 MR. WARNER: It's well into its sixth year. We have 400
9 ECF filings, and we know you came in late, so I -- we really
10 appreciate the opportunity, and I know I speak for Mr. Dingman as
11 well, to explain this to you, so don't worry about that.

12 I also want to note that *Aguilar* is a case without
13 precedential value. So defendant's argument essentially is that
14 a case without precedential value somehow created a significant
15 change in landlord tenant law within the Fourth Circuit alone and
16 nowhere else. That's going to require private landlords be sort
17 of effectively pressed into service as agents of the immigration
18 authorities. The case doesn't support that.

19 Your Honor, I want to make a final point that you didn't
20 raise at the beginning but it worried me somewhat when we read it
21 in your order, and that is with respect to standing. As I said,
22 we understand this is an extremely confusing case. We -- I'm
23 trying to make clear. If it were true, and it is not, but if it
24 were true that the defendants were able to meet their burden at
25 Step 2 and that we were not able to meet our burden in Step 3,

1 then effectively we have no case, we have lost, there is no
2 cognizable injury.

3 So standing -- the question of standing really is a *non*
4 *sequitur* in that case, in that instance, but what worried me a
5 little bit is that it appears that what the question implies is
6 that somehow the male plaintiffs would not have an injury if they
7 were forced by a discriminatory policy to leave their wives.

8 THE COURT: Right. And I've looked at that further. I
9 think there's an injury there, so I don't need you to go down
10 that road any further. I can't -- I mean, there's not a case,
11 per se, on point on that, but forcing males to leave -- to tell
12 their wives that they have to leave the residence is an injury,
13 and that gives you standing.

14 MR. WARNER: I said that was my last point. I was wrong.
15 I want to say something about Step 3 for a moment. Mr. Dingman
16 raised it.

17 Step 2 and Step 3 inquiries are obviously merged up, they
18 become part of the same thing, but our -- we have enormous
19 disputes about the validity of various policies. Are ITINs
20 sufficient to do a credit and criminal background check is a
21 significant dispute, for example. Whether there are alternative
22 ways to do things are hotly disputed throughout this process.
23 The -- and which policy applied at which time is a hot dispute.

24 A primary issue that floats through on Step 3, I just want
25 to point out, is that whatever the policy was in effect before

1 2015, the policy was -- it wasn't until 2015 that the
2 plaintiffs -- the defendants began to apply this policy against
3 the plaintiffs. There was a period in time before then when
4 things were presumably going along just fine. That alone, Your
5 Honor, is sufficient to show alternative policies under Step 3.

6 Thank you.

7 THE COURT: All right. Thank you.

8 All right, Mr. Dingman.

9 MR. DINGMAN: Thank you, Your Honor. I just want to
10 address a couple of those points. And I'll just start where
11 counsel left off.

12 With this Step 3, I mean, the issue is, if the Court
13 accepts, and I'll come back to IRCA and *Aguilar*, that there is
14 risk of criminal prosecution, there simply is no other way to
15 address that than to ask, and they've not proffered one. And we
16 are not suggesting that *Aguilar* now mandates that every landlord
17 has to engage in this type of policy. What we're saying is the
18 facts here before the Court which are undisputed place the
19 defendants at risk if they do not ask.

20 All the Court has to do is go back to the complaint by the
21 plaintiffs themselves where they say, mobile home parks tend to
22 be a place where illegal immigrants can find a home to live.
23 There's a high concentration of Latinos in this area. There's a
24 high concentration of illegal immigrants in this area. Not in
25 Tyson's Corner, not in some other part of Fairfax County, at this

1 park. And at this park there is actual knowledge that the female
2 plaintiffs were not in the United States legally. There's actual
3 knowledge that others staying at the park were not in the United
4 States legally.

5 THE COURT: Is it -- isn't it also -- and I hadn't thought
6 of this. Is it an alternative policy to do -- to go back to
7 pre-2015 and say, We require social security numbers, passports,
8 green cards, or any other evidence that you have to prove that
9 you're here lawfully and then just not require any specific
10 document but go on assurances or the word of the husband or
11 whatever? What was happening pre-2015 where there wasn't really
12 any enforcement? Is that an alternative policy as plaintiffs
13 suggest?

14 MR. DINGMAN: No. It's not an alternative policy, Your
15 Honor, and there's a dispute about the enforcement of the
16 policies that are at issue, and I'll come back to that in just a
17 moment. But the fact that, perhaps, for some period of time, for
18 the sake of argument, the policy was not enforced as it should
19 have been, that does not mean that the policy doesn't serve a
20 valid interest in protecting against prosecution under IRCA and
21 the *Aguilar* decision.

22 And to go back to the policy issue for a moment, the
23 plaintiffs continue to want to argue to this Court that there are
24 factual disputes that have merit. This one has no merit, because
25 their claim has never been based on the allegation that the

1 impact that they alleged is due to the fact that a policy only
2 allowed for these three documents. That has never been and is
3 not today the basis for their claim.

4 As they said straightforwardly in their complaint, any
5 policy that requires proof of legal residency has a disparate
6 impact on Latinos because of their high percentage of the
7 undocumented population in this area. They have never argued or
8 alleged to this Court or to the Fourth Circuit that their case is
9 based on the type of documentation that would be accepted. Their
10 argument, their position, the foundation of their claim is that
11 any policy that requires proof of legal residency has this
12 disparate impact.

13 So quibbling over whether this policy was in effect or
14 that policy was in effect, was it any document proving legal
15 residency, which we think is clear from the facts, was, in fact,
16 how the policy was enforced; or whether it was some subset, that
17 has no relevance to this case because the predicate allegation is
18 any policy that requires proof of legal residency is going to
19 have a disparate impact. It does not matter what documents it
20 requires or limits. If it requires proof, it has a disparate
21 impact.

22 THE COURT: Okay.

23 MR. DINGMAN: And going back to again on IRCA and *Aguilar*,
24 this notion that, well, not all landlords are following this
25 policy, again, the Court has to look at the facts of this case,

1 which are, we submit, undisputed on these issues and compare it
2 to *Aguilar*. If you have enough information to be deemed to have
3 some knowledge that your tenants are here illegally, *Aguilar's*
4 implicated, IRCA is implicated.

5 So, if you're a landlord who does not have any of those
6 indications or that knowledge, we're not suggesting that *Aguilar*
7 requires a landlord to ask these questions or ask for proof of
8 legal residency, but here, at this park, based on the plaintiff's
9 own allegations, the knowledge of that possibility is
10 significant, and it has now been proven by the female plaintiffs
11 themselves.

12 THE COURT: What is that? I mean, what knowledge -- I
13 guess -- I'm not sure -- well, it may be relevant, but what
14 precipitated Waples enforcing its policy in 2015 the way that
15 they did? Was it some knowledge of the immigration status of
16 tenants?

17 MR. DINGMAN: I -- it was a combination of two things:
18 One, frankly, was more rigorous enforcement of the policy itself
19 that had -- that had been lax. And the issue really for the park
20 in operating in this location is to be able to ensure that the
21 people who are living there, who are residing there, are in the
22 United States legally so that there are no ramifications that
23 come back to the defendants.

24 THE COURT: Was it -- I'm sorry. Was it a tenant who
25 turned 18 who had a sex offender conviction?

1 MR. DINGMAN: There were some issues at another park where
2 there was some pretty unfortunate criminal activity, and that
3 did -- that was one of the impetus for saying, okay, let's make
4 sure that we are enforcing our policies as we should, and so that
5 certainly was one of the reasons that the policy was -- I won't
6 say enforced but the managers were directed to make sure that
7 there was compliance.

8 And, as a result of that, there was clear evidence that
9 the female plaintiffs, as an example, that there were individuals
10 living at the park or in the United States illegally, and given
11 the demographics and all the allegations of the plaintiffs,
12 that's what creates the risk.

13 So it's not to say every landlord has to engage in this.
14 But when you look at the facts of this case and this park, we
15 suggest that it undoubtedly rises to the level that there's risk
16 if you do nothing and allow people whom you know or have a pretty
17 good knowledge or belief are in the United States illegally.
18 That's what Ms. Aguilar did.

19 So it's not this broad mandate, as plaintiff suggests;
20 it's based on the facts of this case, and there's no fact dispute
21 about these issues. Again, and I know I'm repeating myself, but
22 the very predicate for disparate impact is the allegation of the
23 plaintiffs that there's a high percentage of undocumented aliens
24 who are Latino in this particular area. That's their basis for
25 why there's disparate impact.

1 Defendants have knowledge of that as well, and they have
2 actual empirical evidence of people living in the park who are
3 not documented, and they are not in the United States legally, so
4 the suggestion that you can simply ignore that and hope that
5 there's no ramifications, no prosecution, we think it's just
6 without any basis, Your Honor. Again, not a broad requirement,
7 but under these facts we've established the necessity to avoid
8 even the potential of criminal prosecution.

9 THE COURT: All right. Thank you.

10 MR. DINGMAN: Thank you.

11 MR. WARNER: Would you indulge me for a moment?

12 THE COURT: Yes, I will.

13 MR. WARNER: Thank you.

14 The first point I want to make is that the question for
15 Step 2, which is a business necessity, is not whether there is
16 any theoretical risk of something but rather whether this is
17 necessary for the operation of the business. So I -- I know the
18 way we talk about this slides back and forth, but I want to make
19 clear that theoretical risk of prosecution is not the standard
20 here, and it really shouldn't be.

21 THE COURT: Well, no. I don't know what you mean by
22 "theoretical." There's a statute on the books, and it's been
23 applied in this -- in the *Aguilar* situation, so that's real life.
24 That's not theoretical, and, I mean -- so I don't understand what
25 theoretical means.

1 MR. WARNER: What I'm saying is that in my case as a
2 practicing advice lawyer on some occasions, if someone asks me
3 what's the risk to me from this, and I read the *Aguilar* case, and
4 I go, Well, unless you're running a flophouse or you're renting
5 out nine of ten rooms of your house to people and the immigration
6 authorities are visiting you on a regular basis, the risk to you
7 is extremely small. That's what I mean by risk.

8 THE COURT: All right. Well, that's malpractice, I think,
9 but we could differ on our belief on that. The advice should be
10 we have an anti-harboring statute and this is what it says, and
11 you're at risk if you do X, Y or Z. I will tell you that it
12 hasn't been applied in other than extreme circumstances, but you
13 have to lay the foundation first, and the foundation is there's a
14 law on the books.

15 MR. WARNER: Your Honor, "harboring" and "leasing" are two
16 very different things, and I -- I don't want to go into all of
17 that. I'm sure you will research it, but that's the very point.
18 Harboring, there is an intent to --

19 THE COURT: Yeah. To hide somebody in your premises.

20 MR. WARNER: Correct.

21 THE COURT: Absolutely.

22 MR. WARNER: And leasing is not in any way harboring, but
23 let me just also respond briefly to a couple of points. One is
24 that, with respect to the question of which policy applied at
25 which time, I think I actually have some agreement with

1 Mr. Dingman, and I should clarify that for the Court. And that
2 is that any policy that required proof of immigration status in
3 any form, the female plaintiffs could not meet that policy.

4 THE COURT: Okay.

5 MR. WARNER: Our issue with respect to which policy
6 applied at which time was actually to make a point with respect
7 to Step 3, which was that some versions of their policy as they
8 came out didn't really actually do a very good job of
9 distinguishing those who were legally present and those who
10 weren't. The Step 3 point gets down the line, but with respect
11 to our primary case -- in fact, our Step 1 case is based on a
12 proposition that they had a policy that our plaintiffs could not
13 meet, and that it had a disparate impact.

14 I also need to respond somewhat to Mr. Dingman's point
15 that in his factual situation, the Waples' factual situation,
16 somehow that was different, and that they then presented more
17 risk than they had to respond. I don't really understand how
18 that works. I mean, how does one decide that those are in a
19 riskier situation? Is it because the people that you rent from
20 have accents, because they're darker? Is it because they dress
21 in a different way?

22 I mean, I -- I'm -- this is a path that I don't think
23 courts want to go down, and I don't think Mr. Dingman wants to go
24 down, and I don't think Waples wants to go down. But I just
25 point that out, that what we have here is a situation where what

1 we're saying is that -- you know, Mr. Warner, he's got no hair,
2 but he used to have light hair, he has got light skin, he doesn't
3 have an accent. We don't have to ask him, but the next guy we
4 do. And I don't think that's appropriate.

5 Thank you.

6 THE COURT: All right. Well, thank you once again for
7 coming in and helping me navigate the issues in the case. It's
8 such an interesting case. And we'll get you out a decision on
9 this in a little bit, and I know we've got all kinds of other
10 pending motions that we'll have to address if the case is going
11 to move forward, and I guess we'll start where Judge Ellis did,
12 with issuing -- and maybe I'm retreading old ground.

13 Was a final -- was a Rule 26 order ever issued to start
14 discovery on the case? It was and then you went all the way
15 through discovery, and then these are the summary judgment
16 motions, and now in limine motions are the next step up.

17 So we'll let you know whether we need oral argument on the
18 in limine motions and schedule those, and -- but we'll look at
19 them. We'll turn to those right away after -- if the case is
20 going to continue.

21 I apologize for asking. Do we have a trial date?

22 MR. DINGMAN: We do, Your Honor. It's in March.

23 THE COURT: Right. Okay.

24 MR. DINGMAN: I don't know the precise date off the top of
25 my head.

1 THE COURT: Yeah, I know it's right after my five-week
2 gang case. Yeah. Okay. Well, we've got some time for us to
3 resolve that, then, and -- okay.

4 All right. Anything else for the good of the order here?

5 MR. DINGMAN: Nothing for the defendants, Your Honor.

6 THE COURT: Okay. All right. Well, thank you again, and
7 we'll get you out a decision as soon as we're able to.

8 All right. Thank you. We're in recess.

9 (Proceedings adjourned at 11:07 a.m.)

10 **C E R T I F I C A T E**

11
12 I, Scott L. Wallace, RDR-CRR, certify that
13 the foregoing is a correct transcript from the record of
proceedings in the above-entitled matter.

14 /s/ Scott L. Wallace

10/27/21

15 -----
16 **Scott L. Wallace, RDR, CRR**
Official Court Reporter

Date